

## FIVE FEDERAL LAWS AND THE NATIONAL COMPACT

### Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act of 1978 was enacted due to the disproportionate percentage of Indian children who were removed from their homes along with the perceived failure of states to recognize tribal relations and the prevailing cultural and social standards in Indian communities and families. 25 U.S.C. § 1901.

The goal of ICWA is to protect the best interests of Indian children while promoting stability and security of Indian tribes and families by establishing minimum standards for removal and placement of Indian children that reflect the unique values of the Indian culture. 25 U.S.C. § 1902.

ICWA governs state court proceedings involving the custody of an “Indian child.” 25 U.S.C. § 1902. “Indian child” is defined to include any person under 18 who is either a member of an Indian tribe or who is the biological child of a member and eligible for membership. 25 U.S.C. § 1903(4). Tribal membership or eligibility is determined by the tribe rather than the court. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 fn. 32, 98 S. Ct. 1670, 56 L. Ed.2d 106 (1978). The child’s membership must be in one of the federally recognized tribes for ICWA to apply. 25 U.S.C. § 1903(8).

Leadership by the court is essential to ensure ICWA compliance. If ICWA requirements are not met, Indian children will face significant delay in achieving permanency. It is in the best interests of the child that the required inquiries be made from the time of the initial removal hearing and continue throughout the case.

#### **Key provisions of ICWA include:**

- The tribe has exclusive jurisdiction for Indian children who reside or are domiciled within a reservation or are wards of a tribal court, even if not domiciled within a reservation. 25 U.S.C. § 1911(a).
- The tribe and the state court have concurrent jurisdiction when a child does not reside or is not domiciled on a reservation, but the preference is for tribal jurisdiction. 25 U.S.C. § 1911(b).
- There are specific placement preferences for foster care placements and adoptions. 25 U.S.C. §§ 1915(a)-(d).
- Strict evidentiary standards must be applied for removal of Indian children from their families and termination of parental rights. 25 U.S.C. §§ 1903(1)(i), 1912(e)-(f).
- The definition of “best interests” includes consideration of the child’s cultural and tribal identity. *See* 25 U.S.C. § 1901(5).
- Additional procedural and substantive protections are afforded to Indian families. *See* 25 U.S.C. § 1912(a).

## Application.

- The department promulgated Section 65C-28.013 Florida Administrative Code to facilitate the implementation of ICWA.
- The department is encouraged to enter into agreements with recognized American Indian tribes in order to facilitate the implementation of ICWA. § 39.0137(2).
- The Florida Administrative Code, § 65C-28.013(1)(2007), requires all child protection investigators to determine if a child is eligible for the protections of ICWA at the beginning of an investigation. *See also T.D. v. Department of Children and Family Services*, 890 So. 2d 473 (Fla. 2nd DCA 2004). (DCF or the trial court should inquire of parents or relatives during the initial stages of the case to determine the applicability of ICWA.)
- 25 U.S.C. § 1912 requires the child's tribe to be noticed of all legal proceedings. If a child's tribe is not currently known, written notice must be sent to the U.S. Secretary of the Interior. 25 U.S.C. § 1912.
- Placement with the tribe is not absolute. *Seminole Tribe of Florida v. Department of Children and Families*, 959 So. 2d 761 (Fla. 4th DCA 2007). (An Indian tribe attempted to change the placement of a four-year-old child from a medical foster home to that of a tribal foster family pursuant to the Indian Child Welfare Act. Because of the child's premature birth, the child had severe medical conditions. The court held that although ICWA provides a presumption in favor of placement with other tribal members, in this case, the tribal family could not meet the child's unique needs given their unfamiliarity with the child's medical conditions.)
- 25 U.S.C. § 1912(f) requires that any order terminating parental rights to an Indian child be supported by evidence beyond a reasonable doubt, "rather than the clear and convincing evidence standard set forth in Chapter 39. *J.P.H. v. Florida Department of Children And Families/ J.H. v. Florida Department of Children and Families*, 39 So. 3d 560 (Fla. 1st DCA 2010).
- A tribe had a clear right to intervene pursuant to section 1911(c) of the Act, and is not required to be represented by a member of the state bar, since enforcement of state prohibitions on the unauthorized practice of law interfere with and are thus preempted in the narrow context of state court proceedings subject to the Indian Child Welfare Act. *J.P.H. v. Florida Department of Children and Families/ J.H. v. Florida Department of Children and Families*, 39 So. 3d 560 (Fla. 1st DCA 2010).

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National Council of Juvenile and Family Court Judges, Technical Assistance Brief: Indian Child Welfare Act Checklists for Juvenile and Family Court Judges  
(<http://www.ncjfcj.org/sites/default/files/ICWAChecklistFullDoc.pdf>) June 2003.

Bureau of Indian Affairs, 1849 C. Street, N.W., Mail Stop 6218, MIB, Washington D.C. 20240, (202)208-3711. [www.bia.gov](http://www.bia.gov)

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[www.doi.gov](http://www.doi.gov).